Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Offense Conduct

CALCULATING WEIGHT OF DRUGS

Tenth Circuit affirms converting powdered cocaine into cocaine base for sentencing where facts showed that object of the conspiracy was to convert powder to crack. Defendant was convicted of eleven drug-related counts, including conspiracy to distribute cocaine base, distribution of cocaine, and manufacture of cocaine base. The presentence report stated that defendant had distributed both cocaine powder and cocaine base. In determining what amounts and kinds of cocaine to attribute to defendant for sentencing, the probation officer concluded that the intent of the conspirators was to distribute the cocaine as cocaine base, and recommended converting the amount of powdered cocaine involved to cocaine base. The sentencing court agreed, finding that the conspirators routinely converted powder cocaine to crack and provided "cooking" instructions for coconspir-ators when necessary. The court sentenced defendant based on the quantity of cocaine base—after the conversion—ultimately distributed, and defendant appealed.

The appellate court affirmed: "According to U.S.S.G. 2D1.4 (1991) [now consolidated into § 2D1.1], '[i]f a defendant is convicted of a conspiracy or an attempt to commit an offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.' The district court made the factual determination that the cocaine powder involved in the conspiracy was routinely converted to crack. The eventual conversion was foreseeable to, if not directed by, Mr. Angulo-Lopez. Under the Guidelines, it is proper to sentence a defen-dant under the drug quantity table for cocaine base if the record indicates that the defendant intended to transform pow-dered cocaine into cocaine base. . . . The record supports the district court's findings that Mr. Angulo-Lopez intended the powdered cocaine to be converted into crack."

See also U.S. v. Paz, 927 F.2d 176, 180 (4th Cir. 1991) (where "a defendant is convicted of conspiracy to manufacture crack, but the chemical seized was cocaine, the district court must . . . approximate the total quantity of crack that could be manufactured from the seized cocaine"); *U.S. v. Haynes*, 881 F.2d 586, 592 (8th Cir. 1989) (for defendant convicted of conspiracy to distribute cocaine, evidence supported finding that defendant sold crack, not cocaine powder, and it was proper to convert seized powder cocaine and currency into crack cocaine for sentencing).

U.S. v. Angulo-Lopez, No. 92-6370 (10th Cir. Oct. 26, 1993) (Brorby, J.).

See *Outline* at II.B.3.

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Watch, No. 91-8671 (5th Cir. Nov. 5, 1993) (Barbour, Chief Dist. J.) (Vacating defendant's conviction, remanding for repleading: District court violated Fed. R. Crim. P. 11 by not informing defendant that, although his indictment purposely omitted alleging drug quantity in order to avoid the mandatory minimum sentences under 21 U.S.C. § 841(b), he could still be subject to a mandatory term after the Guidelines' calculation of quantity. "Because statutory minimum sentences are incorporated in the quantity-based Guidelines, the government is prevented from avoiding application of the statutory minimum sentences prescribed in § 841(b)(1)(A) and (B) by simply failing to include a quantity allegation in an indictment or information in hopes of having the less severe penalty range of § 841(b)(1)(C) applied by default. The failure to include a quantity allegation in an indictment or information has no effect whatsoever on the determination of the appropriate sentence under the Guidelines."

"At the time of Watch's guilty plea, he was not guaranteed application of the sentence range provided for in § 841(b)(1)(C), as represented by the government and accepted by the district court, because the quantity of drugs involved in the offense had yet to be determined. While the district court was not required to calculate and explain the applicable sentence under the Guidelines before accepting Watch's guilty plea . . . , we find that the district court was required to inform Watch of any possible statutorily required minimum sentences he might face as a result of application of the quantity-based Guidelines. . . . The practical consequence of this determination is that a prudent district judge hearing a plea from a defendant charged under an indictment or information alleging a § 841(a) violation but containing no quantity allegation may simply walk a defendant through the statutory minimum sentences prescribed in § 841(b), explaining that a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged.").

See *Outline* at II.A.3 and IX.A.2.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit affirms sentence below statutory minimum in absence of substantial assistance motion as remedy for government's breach of plea agreement. Defendant pled guilty to a drug count under an agreement with the government. In exchange for defendant's cooperation in providing information and testifying against his cousin, the government agreed to inform the district court of his cooperation and "to recommend to the sentencing court that defendant be sentenced to the minimum period of incarceration required by the Sentencing Guidelines." Defendant's guideline range was 41–51 months, but he was sentenced to the applicable five-year mandatory minimum after the government refused to move under 18 U.S.C. § 3553(e) for a lower sentence. Defendant did not appeal, but later moved under 28 U.S.C. § 2255 to vacate

his conviction or correct his sentence. The district court found that the government had breached the plea agreement by not making a § 3553(e) motion and that its continued refusal to recommend departure was in bad faith. The court changed defendant's sentence to 41 months, which it concluded was the sentence called for by the plea agreement.

The appellate court affirmed. The issue here was "what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty. . . . As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" The term "minimum period of incarceration required by the Sentencing Guidelines" was ambiguous because it could be taken to mean the computed guideline range or, as the government argued, the mandatory minimum term, which under § 5G1.1(b) becomes "the guideline sentence."

The appellate court was also persuaded by the fact that, to accept the government's position, it would have to conclude that defendant agreed to cooperate in exchange for no benefit. At the time of the agreement all the sentencing factors were known, and "the parties should have been aware that De la Fuente's guideline sentencing range of 41–51 months would lie entirely below the statutory minimum of 60 months. By providing for a sentencing recommendation in this circumstance, the parties must surely have envisioned a sentence below the statutory minimum. Otherwise, the provision would have served no purpose. . . . We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. Even if we believed that the government in fact acted in such an unfair manner in this case, we would decline to acknowledge and reward such conduct in light of the high standard of fair dealing we expect from prosecutors."

U.S. v. De la Fuente, No. 92-10719 (9th Cir. Oct. 27, 1993) (Reinhardt, J.).

See *Outline* at VI.F.1.b.ii.

Determining the Sentence

Supervised Release

U.S. v. Chukwura, No. 92-8737 (11th Cir. Nov. 1, 1993) (Hatchett, J.) (Affirmed: As a condition of supervised re-lease, the district court had authority to order deportation of foreign national who was already subject to deportation. 18 U.S.C. § 3583(d) "plainly states that if a defendant is sub-ject to deportation, a court may order a defendant deported 'as a condition of supervised release.' The statute then provides that if the court decides to order the defendant's deportation, it then 'may order' the defendant delivered to a 'duly authorized immigration official' for deportation. . . . The lan-guage is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." The appellate court also held that defendant was not denied a deportation hearing: "The Sentencing Guidelines specifically require sentencing courts to address many of the factors that arise at regular INS deportation hearings. While we do not require district courts, contemplating whether to order a defendant deported, to conduct an INS type hearing, we are confident that in this case the sentencing hearing met those requirements.").

See *Outline* at V.C.

General Application Principles

Relevant Conduct

U.S. v. Wishnefsky, No. 93-3009 (D.C. Cir. Oct. 29, 1993) (Ginsburg, J.) (Affirmed: Criminal conduct that occurred outside five-year statute of limitations may be considered as relevant conduct under the Guidelines. District court properly included amounts embezzled from 1980–1986 as "part of the same course of conduct or common scheme or plan" in calculating loss caused by defendant convicted of embezzlement during 1987–1990.).

See *Outline* at I.A.4 and II.D.4.

U.S. v. Sykes, No. 92-2984 (7th Cir. Oct. 22, 1993) (Rovner, J.) (Remanded: Following test for "similarity, regularity, and temporal proximity," it was error to include as relevant conduct fourth fraud count that was dismissed as part of the plea agreement. Without more, general similarity of defendant's attempts to obtain money or credit by using false name and social security number does not comprise "same course of conduct or common scheme or plan" under § 1B1.3(a)(2). Here, defendant's acts, four frauds in a 32-month period, were "not sufficiently repetitive to enable us to call her conduct 'regular'"; the conduct in the fourth count occurred 14 months after the third; and "the acts charged in count IV differ in significant respects from the earlier conduct.").

See *Outline* at I.A.2.

Adjustments

Multiple Counts

U.S. v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (Affirmed: It was proper to group defendant's three mail fraud counts separately from two counts of money laundering (for depositing in a bank the insurance proceeds that were received as a result of the same frauds). The fraud and money laundering counts could not be grouped together under § 3D1.2(a) or (b) because they involved distinct acts and different victims. Defendant contended that all counts should be grouped under § 3D1.2(c) because the knowledge that the money laundered funds were derived from mail fraud "embodies conduct that is treated as a specific offense char-acteristic" in the money laundering guideline. The appellate court held, however, that "[t]he 'conduct' embodied in the mail fraud counts is the various acts constituting the frauds, coupled with the requisite intent to deceive; the 'specific offense characteristic,' in U.S.S.G. § 2S1.2(b)(1)(B), is knowledge that the funds being laundered are the proceeds of a mail fraud. It happens that Lombardi's knowledge of the funds' source derives from the fact that he committed the frauds, but that does not make the fraudulent acts the same thing as knowledge of them." To hold otherwise would allow a defendant to "get exactly the same total offense level whether the defendant committed the mail fraud or merely knew that someone else had committed it.").

See *Outline* at III.D.1.

Acceptance of Responsibility

U.S. v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993) (per curiam) (Affirmed: Nov. 1992 amendment to U.S.S.G. § 3E1.1(b) providing for possible three-point reduction is not retroactive.).

See *Outline* at III.E.4.